

Written Statement of Summary of Testimony to be Given by Professor Edward F. Sherman at the Hearing of the Oversight and Investigations Subcommittee, House Energy and Commerce Committee on “The Silicosis Story: Mass Tort Screening and the Public Health,” on March 8, 2006

Good Morning, Chairman Whitfield, Congressman Stupak, Members of the Subcommittee. I am pleased to be here this morning. I am Edward F. Sherman a professor of law at Tulane University Law School in New Orleans, Louisiana. I was also the Dean of Tulane University Law School from 1996 to 2001. I previously taught at the University of Texas School of Law where I was the Edward A. Clark Centennial Professor of Law (1977-1996), at the University of Indiana School of Law (1969-1977) and as a Teaching Fellow at Harvard Law School (1967-1969). Upon graduation from Harvard Law School in 1962, I clerked for a federal district judge in the Western District of Texas and practiced with a Texas law firm. My areas of teaching and research are Complex Litigation, Civil Procedure, and Alternative Dispute Resolution, and I have published casebooks on these subjects that are used in law schools around the country. I have been on the Members Consultative Group of the American Law Institute's Complex Litigation and Transnational Civil Procedure Projects. I served as Chair and Reporter for the 2001-2003 American Bar Association's Task Force on Class Action Litigation. I was the Reporter for the ABA's Tort Trial and Insurance Practice Section's Task Force on Asbestos Litigation 2003-2005, which submitted eight proposals that were adopted as ABA policy by the ABA House of Delegates. I appear in my capacity as a law professor, and not as a representative of the ABA, but will pass on to you three of the proposals made by the Task Force as they relate to the silicosis topic that were adopted by the ABA House of Delegates.

I will discuss *In re Silica Products Liability Litigation*¹ and the significance of the opinion of Judge Janis Graham Jack.² Cases involving some 10,000 plaintiffs against some 250 corporate defendants alleging injuries from silica exposure (most having been removed to federal court from Mississippi courts) were transferred by the Judicial Panel on Multidistrict Litigation to Judge Jack's federal district court in Texas for pretrial disposition. Judge Jack ordered discovery so that factual issues relating to whether there was subject matter jurisdiction could be

¹ No. MDL 1553, U.S. Dist. Ct. for S.D. Texas, Corpus Christi Div.

² 398 F.Supp.2d 563 (S.D. Tex. 2005).

determined. Defendants deposed Dr. George Martindale, a radiologist, who testified that he had not intended to diagnosis silicosis in the 3,617 plaintiffs that he had previously so diagnosed based solely on reading their X-rays. Hearings were held in February, 2005 concerning the nine doctors and two screening firms that accounted for 99% of diagnoses of silicosis.

Judge Jack entered a lengthy opinion and order on June 30, 2005. She found that most of the silicosis claims “were essentially manufactured on an assembly line” through screening companies, doctors, and plaintiffs’ lawyers. She criticized the diagnoses based on readings of X-rays by a small number of doctors who did not personally examine the patients. “Medical histories, physical examinations and other tests were nonexistent or cursory.” The doctors “repeatedly testified that they were told to look for silicosis” and “did as they were told.” In thousands of the cases, individuals who had previously been diagnosed only with asbestosis were now diagnosed with silicosis, although the presence of both diseases in an individual is rare. Thus a “small cadre of non-treating physicians, finally beholden to lawyers and screening companies rather than to patients, managed to notice a disease missed by approximately 8,000 other physicians – most of whom had the significant advantage of speaking to, examining, and treating the Plaintiffs.”

Judge Jack noted that “more than a million U.S. workers continue to be exposed to respirable silica ... most prevalent in occupations such as abrasive blasting (i.e., “sandblasting”), mining, quarrying, and rock drilling. This continued exposure is tragic, because while silicosis is incurable, it is also 100% preventable.” Beginning in the 1970’s, OSHA implemented regulations requiring the use of respirators and other measures to reduce exposure, and additional measures adopted by employers and individuals have also been effective. The Centers for Disease Control has found that the number of U.S. workers exposed to silica dust declined steadily since 1970, and deaths from silicosis declined from 1157 in 1968 to 187 in 1999. Nevertheless statistical probability suggests that there might be 1204 new silicosis cases per year in the U.S. “However, in 2002, the number of new Mississippi silicosis claims skyrocketed to approximately 10,642,” with 7,228 in 2003 and 2,609 in 2004. Public health officials and medical experts “were unaware of any increase in silicosis cases in Mississippi.” Judge Jack attributed this “phantom epidemic” to screening and diagnosis practices. She proceeded to grant a motion for sanctions against a plaintiff law firm and to remand most of the cases to state court for further proceedings.

Judge Jack was able to make the connection between the dramatic rise in silicosis claims and screening/diagnosis practices because such a large number of cases had been transferred to her. Silicosis cases are usually filed in state courts, where a single judge does not have a large enough sample to make such a connection. Also such cases would not normally be consolidated before a federal MDL judge because plaintiff's lawyers typically structure them to avoid removal to federal court. Because she possessed "jurisdiction to determine jurisdiction" as to the propriety of removal, she had the rare opportunity to see the big picture.

The evidence and findings adduced by Judge Jack have an importance beyond the particular cases before her. The practices she identified reflect systemic problems which can exist in other silicosis cases, and indeed in the closely related asbestos cases and cases involving delayed manifestation of disease due to exposure to conditions or products.

I would also like to comment on policies of the American Bar Association that I have attached to my statement. The ABA's Tort Trial and Insurance Practice Section's Task Force on Asbestos Litigation identified many of the same defects in the screening and diagnosing of asbestos claims by "screening vans" operated by for-profit companies. Composed of both plaintiff and defendants' lawyers and representatives of businesses, insurers, and unions, the Task Force found the practices "of concern to reputable attorneys on both sides of the docket." As indicated in its report, it concluded that the screening and diagnosis practices were generating cases where there is no clinical finding other than an X-ray said to be "consistent with an asbestos-related disease." The result can be the filing of claims by persons based on questionable medical diagnoses and the settlement of such cases, deflecting funds from persons with serious conditions.

ABA Proposal for Screening and Diagnosis Standards

The ABA House of Delegates adopted as policy the proposal of the TIPS Task Force that "as authorized by an appropriate court rule, statute, or regulation, standards be established by the states and territories for the operation of screening vans or other forms of mass screening for asbestos-related conditions. These standards should be enforced, as appropriate, by federal, state and territorial governmental agencies; by the investigation and enforcement of bar professional ethics; by the investigation and enforcement of medical societies' ethical standards; and by courts through evidentiary

ruling, rulings on motions for summary judgment, and the issuance of other appropriate orders.”

The standards recommended by the proposal include:

- Screenings should only be done by a qualified medical professional licensed to perform such tests in the state in which the test is performed and in compliance with local, state and federal laws and with the professional standards for physicians and other qualified medical professions for the conduct of medical examinations.

- A physician or other qualified medical professional rendering a diagnosis based on screening should have personally examined the patient and considered all appropriate diagnostic tests, as well as the patient’s full medical history and any other available medical evidence.

- Medical diagnoses based on screening tests should conform to the applicable standard of diagnostic care that is regularly exercised in a doctor-patient relationship.

The TIPS Task Force report noted that screening programs are not suspect if proper standards are followed. The Task Force's proposal stated: “These standards would clearly not prevent the operation of screening programs by unions or community, health, or other non-profit organizations in order to monitor the health and conditions of the persons whom they serve. No interest legitimately served by medical screenings will be hindered by these measures. The standards will, however, substantially reduce the prospects for litigation abuse.” The standards, if adopted and applied, would also assist the state and federal courts by sharply reducing the number of claims filed, substantially easing congested court dockets.

ABA Proposal for Model Case Management Orders

A second important deterrent to the filing and prosecution of unmeritorious cases must be found in court procedures. This can be accomplished through a Case Management Order requiring early in the litigation a detailed written submission stating with great particularity the facts and legal grounds for each claim.³ The ABA adopted as policy the

³ See *Feliciano v. DuBois*, 846 F. Supp. 1033 (D. Mass. 1994). Judge Jack derived important information concerning these cases by requiring the parties to submit “Fact Sheets” providing, for example, as to plaintiffs, specific information about when, where

TIPS Task Force proposal of a Model Case Management Order to be adopted by state and federal courts for asbestos cases.⁴ The approximately 175 pages of standardized discovery required by the Order would require extensive information about the medical condition of the plaintiff and evidentiary support for the claim and injury. I think this is an appropriate order. It was based on California practice, which has reduced the number of unmeritorious asbestos claims clogging the courts. Requiring a lawyer to investigate a case thoroughly in order to provide specific information serves to screen out meritless cases and deter the filing and bundling of multiple cases based on questionable screening diagnoses in hopes of a quick settlement.

ABA Proposal for Model Statute of Limitations

Finally, the ABA adopted as policy the TIPS Task Force proposal that addressed the problem that law suits as to diseases that have a long latency period between exposure and manifestation (as from asbestos or silica exposure) may be filed on the basis of fear and uncertainty of mere exposure or a weak diagnosis in order to prevent the statute of limitations from running. Uncertainty in certain states as to when the statute of limitations begins to run, and, in states having a discovery standard, as to what information will be deemed to constitute notice of discovery, can warrant a prudent attorney to recommend filing suit even though there is no present disability. When some 17,000 asbestos cases were filed en mass in the multidistrict litigation transferred to the U.S. District Court for the Eastern District of Pennsylvania, Judge Charles R. Weiner commented:

[T]hat the screening cases have been filed without a doctor-patient medical report setting forth an asbestos related disease has not been refuted. The basis for each filing, according to the evidence of the moving parties, is a report to the attorney from the screening company which states that the potential plaintiff has an x-ray reading "consistent with" an asbestos related disease. Because this report may set in motion the running of any applicable statutes of limitations, a suit is then commenced without further verification. Oftentimes these suits are

and how he or she was exposed to silica dust and detailed medical information concerning the alleged silica-related injury, and, as to defendants, information (including photographs) of each-silica-related product that defendant designed, manufactured, marketed, sold, or distributed.

⁴ See Appendices to the ABA Task Force Proposal for a Model Case Management Order, adopted by the ABA House of Delegates in January, 2006.

brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.⁵

The overload of asbestos cases in the courts often resulting in serious cases not being reached, or not being subjected to serious settlement consideration, in a timely fashion has led a number of courts to create “pleural registries.” In the early 1990’s, various courts issued orders giving priority to cancer claims or other serious conditions, deferring other cases for trial settings or dismissing them without prejudice. Some registries were voluntary, like the order of Judge Moss, of the Pa. Ct. of Com. Pis., in a 1993 order creating a voluntary pleural registry under which claims of asymptomatic plaintiffs “are dismissed without prejudice, to be reopened on an expedited basis if the plaintiff develops asbestos-related cancers.”⁶ Others were mandatory, moving such claims to an inactive list for a trial setting, or dismissing them without prejudice, with provisions that they could be moved onto a trial or active docket upon a motion meeting certain criteria as to actual manifestation of disease or injury and, in some courts, satisfying certain medical standards.

Constitutional questions based on separation of powers, due process, equal protection, and access to courts have been raised regarding mandatory registries,⁷ but there are no definitive precedents. The ABA adopted as policy the TIPS Task Force proposal for a Model Statute of Limitations for states that provides bright line tests for determining when the statute of limitations begins to run based on manifestation of disability or discovery of disability, whichever later occurs. It provides that the time for the commencement of an action shall be within two years after the later of “the date the plaintiff first suffered disability” or “the date the plaintiff either knew, or through the exercise of reasonable diligence should have known,

⁵ In re: Asbestos Products Liability Litigation (No. VI)(Civ. Ac. No. MDFL 875, E.D. Pa.), Administrative Order No. 8m o, 2 (Jan. 15, 2002).

⁶ Judge Sandra Mazer Moss, “State-Federal and Interstate Cooperation, Case Management Techniques Move Complex Litigation, Hasten Disposition of Asbestos, Other Cases,” State-Federal Judicial Observer (Federal Judicial Center & National Center for State Courts), April 1993, at 3.

⁷ See Professor Erwin Chemerinsky, “Statement of Opposition to Petition to Establish a Court Rule or Administrative Order Creating Statewide Inactive Asbestos Docketing System,” *id.*

that such disability was caused or contributed to by such exposure.” This proposal is based on the belief that, with greater certainty as to when the statute of limitations will commence, based on actual disability or discovery of it, there will not be an incentive for attorneys to undertake the costs and obligations of filing cases based solely on X-ray readings indicating only consistency with disease without manifestation of disability.

Like the ABA, I believe that the asbestos crisis requires multiple approaches directed at systemic conditions that have resulted in the too-loose screening and filing of cases, the clogging of courts by unmeritorious cases and cases filed to prevent the statute of limitations from running, and the pressures (and attractiveness) for defendants to settle questionable bundled cases cheaply, which can disadvantage a plaintiff who subsequently develops a serious disease. These principles should apply equally to silicosis.

I again want to thank you Mr. Chairman and members of the Subcommittee for inviting me here today and for your time. I would be happy to answer any questions you may have.

CURRICULUM VITAE

EDWARD F. SHERMAN

Professor of Law
Tulane Law School

ADDRESS:

Tulane Law School
6329 Freret Street
New Orleans, LA 70118-5670
(504) 865-5979

PERSONAL INFORMATION:

Born: July 5, 1937, El Paso, Texas
Family: Married, two children

EDUCATION:

High School: El Paso High School, El Paso, Texas

College: Georgetown University, Washington, D.C.
A.B., Philosophy, 1959

Graduate: University of Texas at El Paso
M.A., History, 1962
M.A., English, 1967

Law School: Harvard Law School, Cambridge, Mass.
LL.B., 1962
S.J.D., 1981

LEGAL AND ACADEMIC EXPERIENCE:

Legal Aide to Governor of Nevada, 1962 (Ford Foundation Fellowship in State & Local Government)

Law Clerk to U.S. District Judge for the Western District of Texas, Honorable R.E. Thomason, 1963

Law Practice: Mayfield, Broaddus, MacAyeal & Perrenot, El Paso, Texas, 1963-1965

U.S. Army, Captain, Military Police Corps, 1965-1967; U.S. Army Reserve, Judge Advocate General's Corps, 1968-1990 (to Lt. Colonel)

Harvard Law School, Teaching Fellow, 1967-1969

Indiana University School of Law, Bloomington, Indiana, Professor, 1969-1977

Fulbright Lectureship (in International and Constitutional Law), Trinity College, Dublin, Ireland, 1973-1974

American Bar Foundation Fellowship in Legal History, 1975

University of Texas School of Law, Austin, Texas
Edward Clark Centennial Professor of Law, 1977-1996

University of London, Visiting Professor, 1989

Krajowa Szkoła Administracji Publicznej (School of Public Administration),
Warsaw, Poland, Visiting Professor, January-February 1995.

Institute of Comparative Law, Chuo University School of Law, Tokyo, Japan,
Visiting Professor, spring, 1995.

Tulane Law School, Dean and Professor of Law, 1996-2001; Professor of Law,
2001-present.

University of New South Wales, Sydney, Australia, Visiting Professor, 2002.

University of Maine School of Law, Godfrey Distinguished Visiting Professor of
Law, fall, 2003.

SUBJECTS TAUGHT:

Civil Procedure
Complex Litigation
Alternative Dispute Resolution
International Law, International Arbitration
Constitutional Law, Civil Rights, Government Liability
Law of War, Military Law, National Security Law
Jurisprudence, Law and Literature

SELECTED ACTIVITIES:

American Association of University Professors, General Counsel, 1986-1988

American Bar Association

ABA Tort Trial & Insurance Practice Section 2004 Robert B. McKay Award

Reporter, Task Force on Asbestos Reform (2003-2005)

Chair & Reporter, Task Force on Class Action Legislation (2001-2003)

Reporter, Task Force on Offer of Judgment Rule (1995)(TIPS).

Reporter, Summit on Civil Justice System Improvements (1993).

Section of Litigation, Co-chair, Task Force on Federal Rules (1996-99); Task Force on the Public Perception of the Litigation System (1999-2001); Task Force on State of Justice System & Federal Initiatives (1993-1996); Standing Committee on Pro Bono & Public Service (1998-2001); Subcommittee on Computerization, Committee on Discovery (1982-1983).

Section of Dispute Resolution, Co-chair & member, Arbitration Committee, 1999-present

American Law Institute, 1988-present

Complex Litigation Project, Members Consultative Group, 1989-1995

Transnational Civil Procedure, Members Consultative Group, 2001-present

Arbitrator

Expedited Arbitration Panel, Aluminum Co. of America and United Steel Workers of America, 1984-1996

American Arbitration Association, Labor Law Panel, 1989-1996

International Centers for Arbitration, International Arbitrator Panel, 1993-1996; director of training, 1993-1996.

Association of American Law Schools

Chair, Section on Litigation, 1999-2000

Chair, Section on Dispute Resolution, 1995-96

Board, Section on Civil Procedure, 1994-95

Committee on Clinical Education, 1999-present

Expert Witness on Class Action Certification and Management (cases in state and federal courts)

Law & Economics Center, summer program for law professors, 1981, advanced course, 1991

Louisiana Bar Foundation, Judicial Liason Committee, 1999-present

Louisiana State Law Institute, 1996-2002

Louisiana State Bar Association

Board of Governors, 1997-99
 Board, ADR Section, 1997-present
 Committee on Codes of Lawyer and Judicial Conduct, 1999-present

Mediator

Basic Mediation Training Course, 1985; volunteer mediator, Travis County Dispute Resolution Center, 1985-1996; court-appointed mediator, Texas state & federal court cases, 1985-1996

Professor, courses in mediation and arbitration, U. of Texas School of Law, 1986-1996; Tulane Law School, 1996-present; Hamline Law School Summer Mediation Program, 1994; Tulane-Humboldt Universities Intercultural Negotiation/Mediation Summer Program, Berlin, Germany, 1999-2001.

National Institute for Military Justice, Board of Directors (2000-present)

Texas Bar Association

Chair, Committee on Pattern Jury Instructions (Vol. I), 1982-1994

Board & Member, Alternative Dispute Resolution Section, 1984-96

Texas Center for Public Policy Dispute Resolution, Chair of Board, 1993-1996.

Texas Civil Liberties Union, General Counsel, 1992-1996

Travis County Jail Litigation, Court-Appointed Attorney, U.S. District Court for the Western District of Texas, 1981-1990

Travis County Dispute Resolution Center, Board and Vice-President, 1986-1988

Texas Resource Center (for Post-Conviction Capital Representation), Board, 1988-1993, Chair of Board, 1993-1994.

U.S. AID "Stars Project – Vietnam" on drafting new Vietnamese Code of Civil Procedure, 2003

Who's Who in:

America
 American Education
 American Law
 South & Southwest
 International

SELECTED PUBLICATIONS:

BOOKS:

Processes of Dispute Resolution: The Role of Lawyers (with Rau & Peppet)(Foundation Press 2002).

Civil Procedure: A Modern Approach (with Marcus & Redish)(West Pub. Co. 1989, 4th ed. 2005).

Rau, Sherman, and Shannon's Texas ADR and Arbitration: Statutes and Commentary (with Rau & Shannon))(Shepard's McGraw-Hill 1994, West Group 3d ed. 2000).

Complex Litigation: Cases and Materials on Advanced Civil Procedure (with Marcus)(West Pub. Co. 1985, 4th ed. 2004)

Processes of Dispute Resolution: The Role of Lawyers (with Murray & Rau)(Foundation Press 1989, 2d ed. 1996).

Dispute Resolution: Materials for Continuing Legal Education (with Murray and Rau)(National Institute for Dispute Resolution 1991).

Cases and Materials on Military Law: The Scope of Military Authority in a Democracy (with Zillman & Blaustein)(Matthew Bender 1978).

Civil Procedure (Federal and Indiana) (Josephson's Bar Review Center of America 1977).

CHAPTERS IN BOOKS:

"Mediation Training: Career Opportunities and Skill Formation for Other Occupations," 20 ADR & The Law 69 (20th ed. 2006).

"Sources and Bibliography for Alternative Dispute Resolution, in " Alternative Dispute Resolution Handbook 499 (State Bar of Texas 2003).

"Class Actions," in Oxford Companion to American Law 118 (2002).

Volume 3 (Federal Rules 13 & 15), Moore's Federal Practice (1997).

"Applications of Dispute Resolution Processes in the Israeli-Palestinian Conflict," in The Struggle for Peace: Israelis and Palestinians (ed. E. Fernea & M. Hocking 1992)

"Local Court Rules on ADR" and "ADR References," in Handbook of Alternative Dispute Resolution, Chap 23, Appendix B (State Bar of Texas, A. Greenberg, ed.)(2d ed. 1990).

"In-Service Conscientious Objection," in Selective Conscientious Objection: Accommodating Conscience and Security 117 (M. Noone, ed.)(Westview Press 1989).

"Texas Tort Claims Act" (Chap. 60), in Texas Torts and Remedies (H. Edgar & J. Sales, ed.)(Matthew Bender 1987).

"Military Law," in Encyclopedia of the American Judicial System, Vol. 1 (McMillan Pub. Co. 1987).

"Contemporary Challenges to Traditional Limits on the Role of the Military in American Society," in Rowe & Whelan, Military Intervention in Democratic Societies 216 (Croom Helm 1985).

"Responsiveness and Accountability in the Military," in People Versus Government Power 226 (L. Rieselbach, ed.)(U. of Indiana Press 1975).

"Domestic Law and the Military Establishment," in Modules in Security Studies (A. Williams & D. Tarr. ed.)(U. Press of Kansas 1974).

"Bertrand Russell and the Peace Movement: Liberal Consistency or Radical Change," in Bertrand Russell's Philosophy 253 (G. Nakhnikian, ed.)(Indiana U. Press 1974).

"Amnesty and the Military Offender," in When Can I Come Home? A Debate on Amnesty for Exiles, Anti-War Prisoners and Others 92 (M. Polner, ed.)(Doubleday & Co. 1972).

"The Civilianization of Military Law," in With Justice for Some 65 (B. Wasserstein & M. Green, ed.)(Beacon Press 1971).

"Justice in the Military," in Conscience and Command 21 (J. Finn, ed.)(Random House 1971).

"Rights of Servicemen," in The Rights of Americans 621 (N. Dorsen, ed.)(Random House Pantheon 1971).

"Military Justice and Individual Liberty," in A. Yarmolinsky, The Military Establishment: Its Impacts on American Society (A Twentieth Century Fund Study)(Harper & Row 1971).

SELECTED ARTICLES

"Compensation under a Trust Fund Solution to Asbestos Claims: Is It Really Fair?," (with Wallace) 34 The Brief (ABA TIPS Section)(2005).

"Consumer Class Actions: Who Are the Real Winners?" (Godfrey Distinguished Professor Lecture), 56 Maine Law Review 223 (2004)

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"Evolving Military Justice," 67 Journal of Military History 999 (July 2003).

"Courting Controversy: Class Action Practice in the United States," 2 Legal Week Global (UK) 22 (April 2003).

"Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions," 52 DePaul Law Review 401 (2002).

"The Disposition of Afgan War and Al Quaeda Prisoners," Tulane Lawyer 8 (Fall/Winter 2002).

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"Response to Professionalism," 47 Louisiana Bar Journal 324 (2000).

"The Evolution of American Civil Trial Process Towards Greater Congruence with Continental "Dossier Trial" Practice," 7 Tulane J. of Int'l & Comparative Law 125 (1999).

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"Good Faith Participation in Mediation: Aspirational, Not Mandatory," 4 Dispute Resolution Mag. (ABA Section of Dispute Resolution) 14 (Winter 1997).

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"The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process," 15 Review of Litigation 503 (1996), reprinted, 168 Federal Rules Decisions 75 (1996).

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"Standards of Professional Conduct in Alternative Dispute Resolution," Symposium from AALS, 1995 Journal of Dispute Resolution 95.

"Policy Issues for State Court ADR Reform," Alternatives 142 (Nov. 1995).

"Tradition and Innovation in International Arbitration Procedure" (with Rau), 30 Texas Int'l Law J. 89 (1995).

"A Process Model and Agenda for Civil Justice Reforms in the States," 46 Stanford Law Review, 1553 (July 1994).

"Managing Complex Litigation: Procedures and Strategies for Lawyers and Courts," 57 Texas Bar Journal 149 (Feb. 1994)(Book Review).

"Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?" 46 S.M.U. Law Review 2079 (1993).

"Judge Jerre Williams: A Worthy Academic Career," 72 Texas Law Review ix (Nov. 1993).

"Aggregate Disposition of Related Cases: The Policy Issues," 10 Review of Litigation 231 (1991).

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"The Role of Religion in School Curriculum and Textbooks," 74 Academe 17 (1988).

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"Evolution of the Laws of War," 110 USA Today 54 (May, 1982).

"Traditional and Developing Concepts of Governmental Liability," Institute on Public Law Liability of Public Officials and Employees (State Bar of Texas 1981).

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"Exit Black: New Chance for Nixon to Push the Court to the Right," Sept. 19, 1971, E.4.

"Critical Look at Military Prison System," June 21, 1970, E.6.

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May 3, 1970, BR.1.

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"My Lai: Army Blow the Lid on Its Own Cover-Up," March 22, 1970, E.1.

"Pretrial Jousting Over My Lai Massacre," Feb. 1, 1970, E.3.

"My Lai: Some Knotty Legal Questions," Dec. 7, 1969, E.3.

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Requirement," 55 Virginia Law Review 483 (1969), reprinted in 48 Military Law Review
91 (1970).

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Harvard Civil Rights-Civil Liberties Law Review 65 (Fall 1968).

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Journal 866 (Sept. 1968).

"Nevada Faces the End of the Casino Era," Atlantic 112 (Oct. 1966).

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**RESOLUTION ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
FEBRUARY 2005**

RESOLVED, That the American Bar Association recommends that states and territories establish by statute or regulation, standards for the operation of screening vans or other forms of mass screening for asbestos-related conditions. These standards should be enforced, as appropriate, by federal, state and territorial governmental agencies and judicial bodies; by the investigation and enforcement of bar professional ethics; and by the investigation and enforcement of medical societies' ethical standards. The objective of screening standards should be to prevent medical screenings from being conducted inaccurately and being misused, but not to prevent legitimate monitoring of health.

1. Such standards should require compliance with:
 - a. Federal Food and Drug Administration and other local, territorial, state, and federal governmental laws and regulations governing the use of medical equipment and testing devices.
 - b. Local, territorial, state, and federal laws and regulations.
 - c. Professional standards for physicians and other qualified medical professionals concerning the conduct of medical examinations, screening tests (including x-rays and pulmonary function tests) and medical diagnoses such as those promulgated by the American Medical Association and the American Thoracic Society.
 - d. Such standards should be technology-neutral and based on current medical technological advancements.

2. The reading, evaluation and reporting of such tests should be performed by a physician or other medical professional qualified under professional and state licensing standards, recognizing that there may be multiple medical professionals carrying out certain functions in the chain from screening through diagnosis.

3. The physician or other qualified and legally authorized medical professional rendering the diagnosis shall have examined the screened individual, either in person or through medically accepted telemedicine or electronic practices, following a complete history of all occupational exposures that might be relevant; and has considered the results of all diagnostic tests performed during the medical examination or screening, including but not limited to pulmonary function tests and x-rays; and has considered all other medical information concerning the patient relevant to the diagnosis that is available to such physician or qualified and legally authorized medical professional.

4. All pulmonary function test reports shall conform with any guidelines or standards adopted by such state or territory pursuant to paragraph 1.c above, and shall be accompanied by the original tracings, and all x-ray reports shall be accompanied by the original x-ray or x-rays, either in original form or as transmitted digitally or in a manner judged to be reliable by qualified medical technology experts.

5. All medical diagnoses shall be made in accordance with the applicable standard of diagnostic care, and such diagnoses must be communicated to the screened individual within a reasonable period of time by the physician or other qualified and legally authorized medical professional rendering the diagnosis.

**RESOLUTION ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
AUGUST 2005**

RESOLVED, That the American Bar Association recommends that federal, state, and territorial courts without any existing Case Management Order governing asbestos litigation, or with an existing Case Management Order that has proven unworkable, utilize the Model Case Management Order, with referenced exhibits, dated August 2005.

**AMERICAN BAR ASSOCIATION
TORT TRIAL & INSURANCE PRACTICE SECTION**

MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER

AUGUST 2005

MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER

This Asbestos Pre-Trial Case Management Order is entered in conjunction with this Court's Asbestos Inactive Docket Order dated _____. This Order sets forth the procedures to be followed when a plaintiff files an asbestos-related Complaint, whether or not said plaintiff previously has been registered on the Registry. This Order also governs certain aspects of discovery and pre-trial motions.

This Order applies to all pending asbestos Complaints and to all asbestos Complaints filed after the date of this Order.

As used herein, the term “plaintiff” also refers to plaintiff’s decedent, if applicable.

IT IS HEREBY ORDERED as follows:

1. Any Complaint alleging an asbestos-related injury must attach the following:
 - A. A Preliminary Fact Sheet in the form attached hereto as Exhibit A, <http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf> completed in full.
 - B. A Physician’s Report signed by a pulmonologist, internist, occupational health physician, or pathologist which diagnoses one or more asbestos-related disease(s). Said physician must be actively licensed to practice medicine and certified by the appropriate subspecialty board in his or her applicable subspecialty. The Physician’s Report must:
 - i. Verify that the diagnosing doctor, or a medical professional employed by and under the direct supervision and control of the diagnosing doctor, has performed all examinations or tests referenced in the Report and conducted any referenced interviews of plaintiff or plaintiff’s representative.
 - ii. Set forth a reliable history of exposure, as described in the “Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos” by the American Thoracic

Society, *Am. J. Respir. Crit. Care Med.*, Vol. 170, pp. 691-715, 2004.

- iii. Set forth a medical and smoking history that includes a review of the plaintiff's relevant past and present medical problems.
- iv. Set forth all findings revealed by any hands-on physical examination of the plaintiff.
- v. Verify that an adequate latency has elapsed between plaintiff's first exposure to asbestos and the time of diagnosis.
- vi. Verify that the doctor has diagnosed an asbestos-related disease to a reasonable degree of medical probability. A diagnosis of findings "consistent with" an asbestos-related disease is not sufficient under this Order.
- vii. Verify that any x-rays, CTs and/or Pulmonary Function Tests were administered in accordance with all applicable state health regulations and that any Pulmonary Function Tests were performed using equipment, methods of calibration and techniques that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5th Ed.) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A), §3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung

Function Testing: Selection of Reference Values And Interpretative Strategies” as published in Am. Rev. Resp. Dis. 1991;144:1202-1218.

viii. Attach copies of all reports interpreting Pulmonary Function Tests that have been administered (including flow volume loops), and all reports of X-ray and CT Scan reports, including B-reading forms when available.

- C. Authorizations in the form attached hereto as Exhibit B, <http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf> executed by plaintiff or plaintiff’s representative, authorizing release of plaintiff’s social security, military, veterans, employment and medical records.
- D. Be accompanied by the current regular filing fee for each named plaintiff (after crediting any fee previously paid with plaintiff’s application to the Inactive Docket).

2. Within thirty (30) days of the service of any Complaint hereunder, any Defendant may file an Objection to Complaint, which states any objections Defendant has as to whether the above requirements for filing an asbestos-related complaint have been met. Plaintiff shall have the right to file a written response to the Objection within twenty (20) days after the date of the Objection. The Court may decide the issue on the papers so submitted, or schedule a hearing, in its discretion, and/or impose sanctions in accordance with applicable law if either side has filed a document under this paragraph without substantial justification.

3. The Clerk shall create and maintain a public file, which shall contain Master Complaints and Master Answers (“Master Pleadings”). Attorneys representing parties in asbestos litigation may file a Master Complaint or Master Answer, and copies of such pleadings shall be served on all counsel who previously filed a Master Pleading. Thereafter, any party represented by counsel who has filed a Master Complaint or Master Answer may file and serve on any adverse party a Summary Pleading, and such Summary Pleading shall have the same force and effect as if the Master Pleading had been filed and served on the adverse party. A Summary Pleading filed pursuant to this General Order shall contain the following:

- i. The case caption, which shall include the names of the parties to the action, the case number, and the name(s) of the party(ies) on whose behalf the Summary Pleading is filed and against whom the Summary Pleading is asserted;
- ii. Notice that the Master Pleading is on file with the Clerk of the Superior Court and the date on which it was filed, that a copy of the Master Pleading and of this General Order may be obtained upon request from counsel filing the Summary Pleading, and that designated portions of the Master Pleading are incorporated by reference in the Summary Pleading. The Summary Pleading shall specify those claims or affirmative defenses contained in the Master Pleading, which are being asserted against the party being served.

- iii. Such case-specific information as may be necessary to satisfy applicable statutes, pleading requirements, and this Order.

An amended Master Pleading shall not be deemed incorporated by reference into any previously filed Summary Pleading without further order of the court. This provision shall not limit the substantive rights of any party, nor limit the right of any party to challenge the sufficiency of any Master Pleading or Summary Pleading.

- 4. Within sixty (60) days after filing a Complaint hereunder, plaintiff(s) shall
 - A. Answer the Standard Interrogatories and Request for Documents attached to Exhibit C <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf> (sub-parts A (1-5) and B) hereto. Said answers shall be full and complete, and must be verified under penalty of perjury.
 - B. Using the form attached hereto as Exhibit D, <http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf> agree to deliver pathology in the parties' possession (including attorneys and consultants) to Defendants' Representative (defined below) within ten (10) days after said Representative is designated pursuant to paragraph 6, below, and noting whether plaintiff objects to destructive testing of said pathology. Any dispute over destructive testing of pathology will be resolved by the Court upon noticed motion. In the event there is no dispute, Defendants' Representative shall return the pathology to plaintiff's counsel within sixty (60) days of receipt.

- C. Using the form attached hereto as Exhibit E,
<http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf> offer
 plaintiff(s) for discovery depositions indicating each deponent's
 availability on no less than three (3) dates (at least 30 and no more
 than ninety (90) days after the date of the offer).

5. The court hereby adopts standard plaintiff interrogatories to defendants,
 attached to Exhibit C <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>(subparts
 C (1-4)), to be answered by defendant under oath without objection except for the
 assertion of a claim of privilege or as provided below.

- A. Upon motion by any defendant made within seventy-five (75) days
 of the effective date of this order, the Court shall determine on a
 one-time basis the propriety of an objection by such defendant that
 providing answers to specific question(s) in the standard plaintiff
 interrogatories to defendants would impose on such defendant a
 particular burden which is not justified by the likelihood that such
 answers will provide or lead to the discovery of relevant and
 material evidence. When a new defendant is served in the litigation
 in this jurisdiction for the first time after the effective date of this
 order, that defendant shall have ninety (90) days following service
 of the complaint to move the court to review any claim of burden it
 may have on the same basis.
- B. Within one-hundred twenty (120) days of the effective date of this
 order, each defendant in any pending action served with a copy of
 this order shall serve upon all counsel who previously filed a

Master Pleading its answers to the standard plaintiff interrogatories to defendants. These answers shall be deemed served in all pending cases, and thereafter it shall be deemed that the defendant has served the same answers in all other subsequently served cases. If at any time a defendant amends or provides further answers, in whole or in part, to the standard plaintiff interrogatories to defendants, it shall serve said amended and/or further answers on all counsel and said amended and/or further answers shall apply to all cases.

- C. The court hereby adopts plaintiffs' standard case-specific interrogatories to defendants (attached to Exhibit C <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>) and a notice of service of plaintiffs' standard case-specific interrogatories to defendants (also attached to Exhibit C <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>). Plaintiffs' counsel may serve such Notice at any time after commencement of the action. Thereupon, unless excused from the obligation to answer by order of the Court, the defendant designated in the Notice shall be required to answer such interrogatories within sixty (60) days after service of the Notice, but no sooner than one-hundred twenty (120) days after service of the complaint upon that defendant.
- D. Nothing herein shall preclude any party from propounding additional non-duplicative discovery.

- E. On the annual anniversary of the date upon which it served its initial answers to Standard Plaintiff Interrogatories to Defendants, each defendant shall either (1) supplement its answers with information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory responses, or (2) serve a verified statement from defendant's most knowledgeable agent(s), officer(s) or employee(s) stating that such individual(s) has reviewed defendant's answers to such interrogatories and that the answers are still true and complete."

6. Defendants are required to cooperate with each other and with plaintiff's counsel in order to coordinate the scheduling of depositions, testing of pathology materials, and scheduling of Defense Medical Examinations. Within fifteen (15) days after service of the materials specified in subpart 4, above, defendants shall notify plaintiffs' counsel of the defense firm which shall act as Defendants' Representative in said case, and plaintiffs' counsel shall work with said Defendants' Representative firm thereafter in connection with discovery, scheduling and pathology issues. If Defendants' Representative's firm subsequently ceases to represent any defendants in said case, the remaining defendants shall notify plaintiffs' counsel within fifteen (15) days of a replacement firm as the Defendants' Representative. The Court hereby recognizes the applicability of the joint defense privilege to work performed by Defendants' Representative in this regard, and to communications among defendants concerning matters, which are the subject of this Order.

7. Plaintiff's depositions shall proceed as follows:

- A. The plaintiff's deposition may be noticed only by the Defendants' Representative or by the plaintiff.
- B. If the deposition is noticed by the Defendants' Representative, defendants shall have 7 hours to depose the witness on the record, absent agreement of the parties or court order.
- C. If the plaintiff notices the deposition, the plaintiff may complete his or her direct testimony before cross-examination is conducted by defendants. If this procedure is used, the time for defendants' cross-examination shall be either 7 hours on the record or three times the amount of time used by plaintiff to complete the direct examination, whichever is longer. Defendants are expected to allocate the available time among themselves and, in the event of inability to agree, shall make a timely motion for protective order before expiration of the time limit.
- D. In the event any defendant is served after completion of plaintiff's deposition, such late-served defendant(s) may request that the Defendants' Representative schedule and notice a further deposition of the plaintiff. Said deposition shall be limited to those matters not adequately covered in the initial deposition including liability issues pertaining to the newly served defendant.

8. Cases governed by this Order may be challenged by expedited summary judgment motions, as follows:

- A. A motion for summary judgment on the ground that there is no evidence tending to show that the plaintiff was exposed to asbestos

for which the defendant is responsible shall be deemed filed if a defendant timely files and serves a Notice of Intent to Request Expedited Summary Judgment. This procedure may be used solely with respect to product, site and contractor identification issues. The Notice of Intent to Request Expedited Summary Judgment need not be accompanied by any supporting papers except as required herein.

- B. A Notice of Intent to Request Expedited Summary Judgment may be served at any time after a trial date is set, or six months have elapsed since the commencement of the action, whichever occurs first, and no later than forty-five (45) days before the date set for Expedited Summary Judgment Hearing. Such Notice of Intent shall contain a certification by defendant's counsel that:
- i. Such attorney has reviewed, or caused to be reviewed by another attorney or legal assistant working under the supervision of such attorney, all of the discovery, which has been exchanged between the plaintiff and the moving defendant in the action;
 - ii. The moving defendant has provided plaintiff with all information in its possession, custody or control (other than expert discovery), which it is required to produce to plaintiff pursuant to proper discovery demand or court order in the action; and

- iii. Plaintiff's responses to discovery in the action have not identified any competent evidence tending to show exposure to asbestos for which the defendant is responsible.
- C. Not later than fifteen (15) days before the hearing date, plaintiff shall file and serve a Response establishing that there is a triable issue of fact as to whether the plaintiff was exposed to asbestos for which the defendant is responsible. In the event that plaintiff fails timely to file a Response to a defendant's Notice of Intent to Request Expedited Summary Judgment, the action shall be dismissed without prejudice.
- D. Not less than five (5) days before the hearing date, the moving defendant may file and serve a Reply to the plaintiff's Response to Notice of Intent to Request Expedited Summary Judgment.
- E. The Court shall have the discretion to make a ruling based upon the submitted papers and without the need of a hearing, and in its discretion, impose sanctions in accordance with applicable law if either side has filed a document under this section without substantial justification.
- F. Nothing herein shall preclude any party from bringing a motion for summary judgment on any ground, in full compliance with the procedures and time limitations generally applicable to civil actions.

EXHIBIT E
TO PROTOTYPE ASBESTOS PRE-TRIAL
CASE MANAGEMENT ORDER
(See Order dated _____)

REPORT

It is hard to see or hear the word "Asbestos" without the word "Crisis". In this context, numbers abound. \$145 Billion proposed for a federal trust fund, 600,000 lawsuits filed, 10 to 20 million people exposed in industrial settings, 30,000 to 50,000 new lawsuits filed a year and scores of bankruptcies. A single case may have thousands of plaintiffs and hundreds of defendants with a settlement value of \$600,000,000.00.

As a result, the media has been focused on the efforts of the asbestos stakeholders to resolve their differences and secure a federal solution to a problem besetting many state and territorial courts. A sample of that media attention has been included in this report so you may understand why the stakeholders represented on the TIPS Asbestos Task Force are not optimistic about a federal solution emerging, especially as long as the federal solution does not address stakeholder uncertainties with federal guarantees.

Recognizing that there was little that the TIPS Asbestos Task Force could add to the negotiations over the amount and allocation of contributions, the TIPS Asbestos Task Force has spent the last twenty-four months developing a trilogy of recommendations to control the flood of claims that have and are inundating our courts. These recommendations provide a Model Case Management Order and extensive standard discovery to address claims already filed and a pair of recommendations approved by the HOD at the 2005 MYM to stem the filing of new claims with the courts. The first approved Recommendation addressed the use and "abuse" of screening vans, a critical factor in producing thousands of non-malignant and non-disabled plaintiffs for a single case filing.

The second approved Recommendation offered a Model Statute of Limitations governing the accrual of actions for injury, illness or wrongful death based upon exposure to asbestos, to address the fear and uncertainty surrounding the running of a statute of limitations that may or may not have been triggered by the information communicated to a person, typically after an examination in a screening van, where there is no clinical finding other than an x-ray "consistent with" an asbestos related disease.

Case Management Orders

In an effort to address the large number of asbestos cases filed in their respective jurisdictions, many courts have issued case management orders ("CMO") setting out detailed schedules and procedures for handling such matters as docketing, discovery, motions, case priorities, trial settings, settlement negotiations, and trial or disposition of asbestos cases. Many of these CMOs have led to the efficient and fair handling of asbestos litigation. On the other hand, there exist jurisdictions in which there are no CMOs, competing CMOs within a jurisdiction, outdated CMOs, or simply CMOs that for one reason or another no longer function as originally intended. The Asbestos Task Force

of the Tort Trial & Insurance Practice Section (“TIPS”) believes that the existing litigation system can be made more efficient and fairer by the promulgation of and adherence to a comprehensive model CMO.

The TIPS Asbestos Task Force examined a large number of pre-trial orders and CMOs, from both federal and state courts and has attempted to distill the best features of these orders into a model CMO. The TIPS Asbestos Task Force does not intend this to be a replacement for existing CMOs that have been developed in various jurisdictions through the input of the courts and counsel, and which have proven effective. Rather, the goal is to adopt a model CMO that can be used to more effectively and fairly administer asbestos litigation in those jurisdictions that have not developed a CMO or in those jurisdictions in which an existing CMO no longer appears to be effective. TIPS submits this model CMO as suggested guidance in such jurisdictions. It is a resource designed by representatives of the plaintiff and defense bar and company defendants and their insurers to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

Furthermore, the TIPS Asbestos Task Force also encourages the use of standard discovery requests by both plaintiffs and defendants, as envisioned in the model CMO, to expedite the timely discovery of the basic and necessary information for the assessment and handling of the asbestos case. Proposed standard discovery requests are referenced in the model CMO (see http://www.abanet.org/tips/atf/cmo/cmo_home.htm). While the TIPS Asbestos Task Force believes that these discovery requests will be effective, it is anticipated that individual jurisdictions may modify the requests based upon the jurisdiction’s statutes, rules, procedures, and practices. The Exhibits to the CMO and the standard discovery requests are voluminous (almost 200 pages):

Case Specific Interrogatories to All Defendants -

[http://www.abanet.org/tips/atf/cmo/Case Specific Interrogatories to All Defendants.pdf](http://www.abanet.org/tips/atf/cmo/Case%20Specific%20Interrogatories%20to%20All%20Defendants.pdf)

Case Specific Interrogatories to Friction Defendants -

[http://www.abanet.org/tips/atf/cmo/Case Specific Interrogatories to Friction Defendants.pdf](http://www.abanet.org/tips/atf/cmo/Case%20Specific%20Interrogatories%20to%20Friction%20Defendants.pdf)

Friction Interrogatories - [http://www.abanet.org/tips/atf/cmo/Friction Interrogatories.pdf](http://www.abanet.org/tips/atf/cmo/Friction%20Interrogatories.pdf)

Heir, Legal Rep Interrogatories - [http://www.abanet.org/tips/atf/cmo/Heir, Legal Rep Interrogatories.pdf](http://www.abanet.org/tips/atf/cmo/Heir,%20Legal%20Rep%20Interrogatories.pdf)

Loss of Consortium Interrogatories - [http://www.abanet.org/tips/atf/cmo/Loss of Consortium Interrogatories.pdf](http://www.abanet.org/tips/atf/cmo/Loss%20of%20Consortium%20Interrogatories.pdf)

Notice of Service - [http://www.abanet.org/tips/atf/cmo/Notice of Service.pdf](http://www.abanet.org/tips/atf/cmo/Notice%20of%20Service.pdf)

Personal Injury Interrogatory - <http://www.abanet.org/tips/atf/cmo/Personal Injury Interrogatory.pdf>

Request for Production of Documents - <http://www.abanet.org/tips/atf/cmo/Request for Production of Documents.pdf>

Standard Interrogatories to All Defendants - <http://www.abanet.org/tips/atf/cmo/Standard Interrogatories to All Defendants.pdf>

Standard Interrogatories to Friction Defendants - <http://www.abanet.org/tips/atf/cmo/Standard Interrogatories to Friction Defendants.pdf>

Wrongful Death Interrogatories - <http://www.abanet.org/tips/atf/cmo/Wrongful Death Interrogatories.pdf>

Exhibit A to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf>

Exhibit B to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf>

Exhibit C to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>

Exhibit D to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf>

Exhibit E to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf>

and can be reviewed on the ABA website at:

http://www.abanet.org/tips/atf/cmo/cmo_home.htm

After a review of the case management orders and standard discovery requests adopted by various jurisdictions and a determination that there are jurisdictions without case management orders to control asbestos litigation or effective case management orders, it is clear that there remains an unmet need. The model CMO is intended to address this need. Adoption of the model CMO by the ABA will go far in accomplishing the goal of providing the courts with the best practices of various jurisdictions used to effectively manage asbestos litigation.

Respectfully submitted

James K. Carroll, Chair
Tort Trial and Insurance Practice Section
August 2005

GENERAL INFORMATION FORM

Submitting Entity: Tort Trial & Insurance Practice Section

Submitted By: James K. Carroll, Chair

1. Summary of Recommendation(s).

The Association recommends that federal, state, and territorial courts without any existing Case Management Order governing asbestos litigation, or with an existing Case Management Order that has proven unworkable, adopt the Model Case Management Order dated August 2005, designed by representatives of the plaintiff and defense bar and company defendants and their insurers to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial & Insurance Practice Section on December 17, 2004.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The medical criteria for asbestos claims adopted by the Association at the 2003 MYM as predicates for filing asbestos related claims would be complimented by the case management orders in those jurisdictions adopting both.

5. What urgency exists which requires action at this meeting of the House?

The 600,000 asbestos claim filings have significantly burdened, delayed and disrupted the operations of State, Federal and Territorial courts throughout the country. The resolution proposes a means for courts to gain control of their dockets and address the claims of the disabled claimants or their families on a priority basis, allowing the claims of the non-disabled or non-malignant cases to wait until disability or malignancy emerges. The case management orders (“CMO”) set out detailed schedules and procedures for handling such matters as docketing, discovery, motions, case priorities, trial settings, settlement negotiations, and trial or disposition of asbestos cases. These lead to the efficient and fair handling of asbestos litigation and make additional judicial resources available for other cases.

The stakeholders are in accord that these changes are needed as soon as possible for the benefit of both the asbestos related claims of the disabled or those with malignancies and all other non-asbestos related claims.

6. Status of Legislation. (If applicable.)

None

7. Cost to the Association. (Both direct and indirect costs.)

None, except the indirect cost of any lobbying efforts by the Association

8. Disclosure of Interest. (If applicable.)

The TIPS Asbestos Task Force is composed of members representing the various stakeholders in the discussion and negotiation of the federal solution to the asbestos crisis, including members who have participated directly and indirectly in the drafting of bills and testified before Congress. They represent diverse interests in the claims settlement crisis including general counsel and staff of insurance trade associations, attorneys for claimants, representative of the AFL-CIO, attorneys for defendants, and staff counsel. The members of the TIPS Council and leadership also represent diverse interests in the asbestos claims crisis as general counsel and staff attorneys of insurance

companies and trade associations, attorneys for claimants, attorneys for defendants, and staff counsel.

9. Referrals.

Simultaneously with this submission, referral is being made to: All Sections and Divisions

10. Contact Person. (Prior to the meeting.)

Hervey P. Levin
6918 Blue Mesa Drive, Suite 115
Dallas, Texas 75252
(972) 733-3242
(972) 733-3269 (Fax)
hervey@airmail.net

11. Contact Person. (Who will present the report to the House.)

Hervey P. Levin
6918 Blue Mesa Drive, Suite 115
Dallas, Texas 75252
(972) 733-3242
(972) 733-3269 (Fax)
hervey@airmail.net

12. Links to Case Management Order exhibits;

Exhibit A to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf>

Exhibit B to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf>

Exhibit C to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>

Exhibit D to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf>

Exhibit E to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf>

13. Exhibit C Discovery Request;

http://www.abanet.org/tips/atf/cmo/cmo_home.htm

**RESOLUTION ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
FEBRUARY 2005**

RESOLVED, That the American Bar Association recommends that the states and territories adopt the Model Statute of Limitations for Asbestos dated February 2005, governing the accrual of actions for injury, illness or wrongful death based upon exposure to asbestos.

FURTHER RESOLVED, That the Model Statute of Limitations for Asbestos is a resource designed by representatives of the plaintiff and defense bar and company defendants to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

EXHIBIT E
TO PROTOTYPE ASBESTOS PRE-TRIAL
CASE MANAGEMENT ORDER
(See Order dated _____)

AMERICAN BAR ASSOCIATION
TORT TRIAL & INSURANCE PRACTICE SECTION
MODEL STATUTE OF LIMITATIONS
FOR ASBESTOS
(FEBRUARY 2005)

Exposure to Asbestos; Actions for injury, illness or wrongful death

(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following:

(1) Within two years after the date the plaintiff first suffered disability.

(2) Within two years after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure.

(b) "Disability" as used in subdivision (a) means the loss of time from work, as a result of such exposure, which precludes the performance of the employee's regular occupation, or if the plaintiff is not working, meeting the medical standards in the "ABA Standards for Non-Malignant Asbestos-Related Disease Claims" (dated February 2003).

(c) In an action for the wrongful death of any plaintiff's decedent, based upon exposure to asbestos, the time for commencement of an action shall be the later of the following:

(1) Within two years from the date of the death of the plaintiff's decedent.

(2) Within two years from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by such exposure.